



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Rainbow Technology, Inc.

**File:** B-232589

**Date:** January 24, 1989

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### **DIGEST**

1. Protest alleging solicitation was not sufficiently specific is untimely under General Accounting Office's Bid Protest Regulations where not filed prior to closing date for receipt of proposals.
2. Where agency reasonably finds that proposal which received a point score of 30 out of 85 possible technical points, indicates only a limited understanding of the objectives of a request for proposals, provides only a skeletal outline of the methodology to be used to accomplish the objects and demonstrates weak experience, the proposal may be rejected as unacceptable.
3. Agency failure to give a protester prompt notification of an award did not prejudice a protester nor does it provide a basis to sustain a protest.

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### **DECISION**

Rainbow Technology, Inc., protests award to King Research, Inc., under request for proposals (RFP) No. 52-SBNB8C5147, issued by the National Institute of Standards and Technology (NIST), Department of Commerce, for a marketing study regarding NIST's sales of the Standard Reference Data (SRD) to the general public.

We dismiss the protest in part and deny it in part.

The RFP requesting a firm-fixed-price marketing study was issued on June 1, 1988. The RFP specified four technical criteria comprising 85 percent of the score with the remaining 15 percent for price. The evaluation factors for award were as follows: (1) understanding the issue, 25 percent; (2) methodology proposed, 20 percent; (3) personnel to be involved, 15 percent; (4) experience with similar studies, 25 percent; and (5) cost, 15 percent.

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Prior to the closing date for receipt of proposals, Rainbow contacted the agency's contracting specialist and requested additional information regarding the specifics of the NIST databases and the users of the databases. In response, the contracting officer's technical representative, through the contracting officer and contracting specialist, telephonically provided Rainbow with additional information. Rainbow did not request further information, nor file a protest alleging that the solicitation was unclear or deficient, before the RFP closing date of July 1.

In response to the RFP, NIST received three proposals from Rainbow, Price Waterhouse, Inc., and King. As a result of the technical evaluation completed on July 22, King, with a price of \$47,800, was determined to be technically acceptable with a technical score of 75 out of 85 possible points. Price Waterhouse had a technical score of 55 with a price of \$80,000. Rainbow, which proposed a price of \$46,417, was considered technically unacceptable with a technical score of 30 out of 85 points. King, therefore, had the highest technical score and its price was only \$1,383 more than that of the protester's technically unacceptable proposal.

NIST states that although no discussions were intended, on July 28,<sup>1/</sup> the contracting specialist mistakenly requested by telephone best and final offers (BAFOs) limited to price from all three offerors, in response to which Rainbow was the only offeror to change its proposal, reducing its price to \$44,096.

On August 1, NIST awarded the contract to King since it had the lowest priced, technically acceptable proposal. Although Rainbow was notified on August 5 that they were technically unacceptable, the contracting agency failed to inform Rainbow that award had been made to King. Rainbow filed an agency-level protest with NIST on August 11, which NIST denied on September 8.

In its September 13 protest to our Office, Rainbow alleges that: (1) the RFP's statement of work was not very informative and NIST did not provide sufficient clarifying information to Rainbow; (2) the technical weaknesses NIST perceived in its proposal were not related to the RFP evaluation criteria; and (3) no technical clarifications

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<sup>1/</sup> The protester claims the BAFO request occurred on August 2 or 3. However, Rainbow provides no documentation to support this claim, which seems improbable since award would have already been made on August 1.

were requested from Rainbow despite its low price, even though a BAFO was requested.

In response to the protest, NIST first contends that the protester's claim that the solicitation was not sufficiently specific is untimely under our Bid Protest Regulations, since the alleged deficiencies were apparent on the face of the solicitation. We agree.

In order for a protest against alleged deficiencies that are apparent on the face of the solicitation itself to be timely, it must be filed before the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a) (1988). Since Rainbow was aware of these alleged deficiencies prior to the July 1 closing date, but did not protest to the agency until August 11, its protest against the solicitation is untimely and is dismissed.

The main thrust of Rainbow's protest to our Office concerns the evaluation of its proposal. Rainbow claims that it was improper for NIST to reject its proposal as technically unacceptable without providing Rainbow with an opportunity to revise it.

The agency asserts that Rainbow's proposal clearly demonstrated its unfamiliarity with the scientific area in question and did not show that the protester had the personnel, experience, and methodology to meet NIST's requirements. NIST states that this determination is indicated by Rainbow's score of 30 out of 85 possible points on the technical rating. NIST says that it did not request further technical clarifications or discussions with Rainbow because its proposal was unacceptable. In effect NIST found Rainbow outside the competitive range.

The evaluation of proposals and the resulting determination as to whether an offeror is in the competitive range are matters within the discretion of the contracting activity, since it is responsible for defining its needs and for deciding on the best methods of accommodating them. John W. Gracey, B-228540, Feb. 26, 1988, 88-1 CPD ¶ 199. In reviewing an agency's evaluation, we will not reevaluate the technical proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and in accordance with the RFP evaluation criteria. Id.

Here the technical evaluators determined that Rainbow's proposal indicated only a limited understanding of the issues pertinent to information dissemination, and was very weak on the understanding of how technical data are used. Further, the evaluators found that with respect to the study

methodology, Rainbow only provided a skeletal outline and a poorly drafted questionnaire for the collection of data, and in the evaluators' judgment a considerable amount of NIST staff time would be needed to help Rainbow personnel design a satisfactory survey.

While the protester contends that the RFP was too vague and additional information concerning the databases was necessary to formulate an acceptable proposal, NIST persuasively maintains that the subject information is publicly available; that offerors were expected to possess knowledge of the existing databases; and that offerors were expected to provide in their proposals: (1) the product usage patterns; (2) a rationale for setting product prices; and (3) a specific product marketing strategy for the unique fields of physics, science, material and chemical data involved; and a methodology.

Rainbow points out that the RFP indicated the contractor would consult with NIST personnel and use NIST mailing lists, and argues that it should not have been downgraded for relying on such resources. However, NIST states that this RFP was seeking new innovative techniques for marketing and improving its products. Specifically, NIST was relying on offerors to be resourceful in suggesting other possible methods of reaching users and providing better products to meet user needs. An agency is not obligated to "spoon feed" offerors as to what factors must be addressed in an acceptable proposal for a marketing study, and a proposal which does not demonstrate the required understanding may be rejected as unacceptable. John W. Gracey, B-228540, supra at 4.

Additionally the evaluators found Rainbow's experience to be weak in the scientific and technical information market, which was of primary interest to NIST. While Rainbow claims that its principal's 20 years of experience in database marketing could fully meet RFP requirements, we agree that Rainbow's nonspecific experience could be downgraded under the RFP.

Based on our review of the material included in Rainbow's proposal, the technical evaluation thereof, and the agency's responses to the protest, we find that the agency's evaluation was reasonable.

Rainbow next contends that merely requesting a BAFO for price does not satisfy an agency's obligation to conduct meaningful discussions, where the agency's evaluators perceive weaknesses and deficiencies in the proposal. NIST responds that Rainbow's proposal was unacceptable; that it

intended to award on initial offers; and that the contracting specialist's verbal request for BAFO's from all three offerors was a mistake.

As indicated above, NIST reasonably found Rainbow's proposal was unacceptable. A reasonable reading of the record indicates that only major revisions tantamount to rewriting Rainbow's proposal could make its proposal the most acceptable proposal. See Campbell Engineering, Inc., B-231126, Aug. 11, 1988, 88-2 CPD ¶ 136. (Proposals requiring major revisions in order to have reasonable chance for award can be eliminated from the competitive range.) Also, Rainbow's experience was reasonably found inferior to that of the awardee. We are persuaded by NIST's explanation that the request for BAFO's was a mistake and that award was made on the basis of initial proposals to the lowest acceptable offeror.

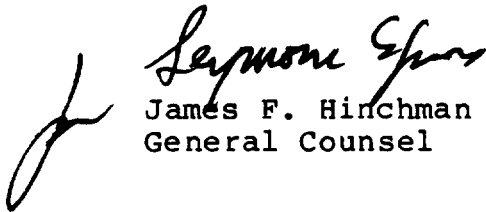
Rainbow also contends that since it offered the lowest price, discussions pointing out the evaluated technical weaknesses should have been conducted with it. However, where an offeror's proposal was reasonably determined to be technically unacceptable effective and outside the competitive range, discussions need not be conducted with it regardless of its low price. Fayetteville Group Practice, Inc., B-226422.5, May 16, 1988, 88-1 CPD ¶ 456; John W. Gracey, B-228540, supra. In addition, we find that Rainbow was not materially prejudiced by NIST's BAFO request in view of Rainbow's minimal BAFO response and clearly unacceptable proposal.

Rainbow also notes that it did not learn from NIST of the August 1 contract award until September 23. Rainbow contends, therefore, that since it had filed its protest with our Office prior to this notification of award, contract performance should have been suspended.

While the protester is correct that NIST failed to promptly notify unsuccessful offerors of the award consistent with Federal Acquisition Regulation (FAR) §§ 15.1001(a) and (c), (FAC 84-13), we find that the late notice did not prejudice Rainbow in any meaningful way, nor does it provide a basis to sustain the protest. See Space Communications Co., 66 Comp. Gen. 2 (1986), 86-2 CPD ¶ 377. In this regard, we have consistently held that a failure to promptly notify an unsuccessful offeror of an award is only procedural in nature and does not affect the validity of the award. Id; L.L. Rowe Co., B-220973, Feb. 27, 1986, 86-1 CPD ¶ 204. Moreover, in this case, Rainbow was promptly apprised on August 5 when it was eliminated from the competition, and this notification led to Rainbow's agency-level protest.

Rainbow's contention that its protest to our Office should require application of the suspension of performance provisions of the Competition in Contracting Act (CICA) found at 31 U.S.C. § 3553(d) (Supp. IV 1986) has no merit. CICA specifically provides that in order for the suspension provisions to be applicable, the agency must receive notice of a protest to the General Accounting Office within 10 calendar days of award. 10 U.S.C. § 3553(d); International Representation & Services, Espana, S.A.--Reconsideration, B-219878.2, June 6, 1986, 86-1 CPD ¶ 529. Rainbow's protest was filed at our Office more than 10 calendar days after August 1. There is no provision in CICA that requires an agency to suspend performance until our Office decides a protest, if the protester chooses to first pursue the matter at the agency-level, see International Representation & Services, Espana, S.A.--Reconsideration, B-219878.2, supra, or where the protester was not more timely apprised that award had been made.

The protest is denied in part and dismissed in part.



James F. Hinchman  
General Counsel